

**Introduced by Senator Maldonado**

February 2, 2005

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An act to amend Section 1347 of the Penal Code, relating to criminal procedure.

**LEGISLATIVE COUNSEL'S DIGEST**

SB 138, as introduced, Maldonado. Criminal procedure: closed-circuit testimony.

Under existing law, in any criminal proceeding the court may order that the testimony of a child 13 years of age or younger be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of 2-way or one-way closed-circuit television if the court makes certain findings. Those findings include that the minor's testimony will involve a recitation of the facts of either an alleged sexual offense committed on the minor or a violent felony of which the minor is a victim, and that the minor witness would be unavailable to testify due to the impact of specified threats, defense conduct, or circumstances of the crime but for the closed-circuit procedure. Existing law specifies the persons that may be physically present for the closed-circuit testimony.

This bill would expand these provisions to apply to cases involving specified child abuse and endangerment charges. It would also permit a court, when a defendant has been charged with a child abuse or sex offense specified in these provisions, to order that the testimony of a child victim 13 years of age or younger be taken by means of a closed-circuit television as specified in this law if the court determines that (1) testimony by the child victim in the presence of the defendant would result in the child suffering serious emotional distress so that

the child could not reasonably communicate, or (2) that the child would be unable to testify for specified reasons. The bill would add the prosecuting and defense attorneys, and any technicians necessary to operate the equipment, to the persons who may be physically present for the closed-circuit testimony.

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 1347 of the Penal Code is amended to  
2 read:

3 1347. (a) It is the intent of the Legislature in enacting this  
4 section to provide the court with discretion to ~~employ unusual~~  
5 *modify* court procedures to protect the rights of a child witness,  
6 the rights of the defendant, and the integrity of the judicial  
7 process. In exercising its discretion, the court necessarily will be  
8 required to balance the rights of the defendant or defendants  
9 against the need to protect a child witness and to preserve the  
10 integrity of the court's truthfinding function. This discretion is  
11 intended to be used selectively when the facts and circumstances  
12 in the individual case present compelling evidence of the need to  
13 use these ~~unusual procedures~~ *modifications*.

14 (b) Notwithstanding any other law, the court in any criminal  
15 proceeding, upon written notice by the prosecutor made at least  
16 three days prior to the date of the preliminary hearing or trial date  
17 on which the testimony of the minor is scheduled, or during the  
18 course of the proceeding on the court's own motion, may order  
19 that the testimony of a minor 13 years of age or younger at the  
20 time of the motion be taken by contemporaneous examination  
21 and cross-examination in another place and out of the presence of  
22 the judge, jury, *and* defendant or defendants, ~~and attorneys~~, and  
23 communicated to the courtroom by means of closed-circuit  
24 television, if the court makes all of the following findings:

25 (1) The minor's testimony will involve a recitation of the facts  
26 of ~~either~~ *any* of the following:

27 (A) An alleged sexual offense committed on or with the  
28 minor.

1     ~~(B) The minor is a victim of a~~ *An alleged* violent felony, as  
2 defined in subdivision (c) of Section 667.5, ~~of which the minor is~~  
3 ~~a victim.~~

4     ~~(C) An alleged offense specified in Section 273a or 273b of~~  
5 ~~which the minor is a victim.~~

6     ~~(2) The impact on the minor of one or more of the factors~~  
7 ~~enumerated in subparagraphs (A) to (D), inclusive, is shown by~~  
8 ~~clear and convincing evidence to be so substantial as to make the~~  
9 ~~minor unavailable child is unable to testify as a witness unless~~  
10 closed-circuit television is used ~~for one or more of the following~~  
11 ~~reasons:~~

12     ~~(A) Testimony by the child victim in the presence of the~~  
13 ~~defendant would result in the child suffering serious emotional~~  
14 ~~distress so that the child could not reasonably communicate.~~

15     ~~(A) Threats of serious bodily injury to be inflicted on the~~  
16 ~~minor or a family member, of incarceration or deportation of the~~  
17 ~~minor or a family member, or of removal of the minor from the~~  
18 ~~family or dissolution of the family, in order to prevent or~~  
19 ~~dissuade the minor from attending or giving testimony at any~~  
20 ~~trial or court proceeding, or to prevent the minor from reporting~~  
21 ~~the alleged sexual offense or from assisting in criminal~~  
22 ~~prosecution.~~

23     ~~(B) Use of a firearm or any other deadly weapon during the~~  
24 ~~commission of the crime.~~

25     ~~(C) Infliction of great bodily injury upon the victim during the~~  
26 ~~commission of the crime.~~

27     ~~(D) Conduct on the part of the defendant or defense counsel~~  
28 ~~during the hearing or trial that causes~~

29     ~~(B) The defendant used a deadly weapon in the commission of~~  
30 ~~the offense.~~

31     ~~(C) The defendant threatened serious bodily injury to the child~~  
32 ~~or the child's family.~~

33     ~~(D) The defendant inflicted great bodily injury upon the child~~  
34 ~~in the commission of the offense.~~

35     ~~(E) The defendant or his or her counsel behaved during the~~  
36 ~~hearing or trial in a way that caused the minor to be unable to~~  
37 ~~continue his or her testimony.~~

38     In making the determination required by this section, the court  
39 shall consider the age of the minor, the relationship between the  
40 minor and the defendant or defendants, any handicap or disability

1 of the minor, and the nature of the acts charged. The minor's  
2 refusal to testify shall not alone constitute sufficient evidence that  
3 the special procedure described in this section is necessary to  
4 obtain the minor's testimony.

5 (3) The equipment available for use of closed-circuit television  
6 would accurately communicate the image and demeanor of the  
7 minor to the judge, jury, defendant or defendants, and attorneys.

8 (c) If the court orders the use of closed-circuit television,  
9 two-way closed-circuit television shall be used, except that if the  
10 impact on the minor of one or more of the factors enumerated in  
11 subparagraphs (A) to (D), inclusive, of paragraph (2) of  
12 subdivision (b), is shown by clear and convincing evidence to be  
13 so substantial as to make the minor unavailable as a witness even  
14 if two-way closed-circuit television is used, one-way  
15 closed-circuit television may be used. The prosecution shall give  
16 the defendant or defendants at least 30 days written notice of the  
17 prosecution's intent to seek the use of one-way closed-circuit  
18 television, unless good cause is shown to the court why this  
19 30-day notice requirement should not apply.

20 (d) (1) The hearing on a motion brought pursuant to this  
21 section shall be conducted out of the presence of the jury.

22 (2) Notwithstanding Section 804 of the Evidence Code or any  
23 other law, the court, in determining the merits of the motion,  
24 shall not compel the minor to testify at the hearing; nor shall the  
25 court deny the motion on the ground that the minor has not  
26 testified.

27 (3) In determining whether the impact on an individual child  
28 of one or more of the four factors enumerated in paragraph (2) of  
29 subdivision (b) is so substantial that the minor is unavailable as a  
30 witness unless two-way or one-way closed-circuit television is  
31 used, the court may question the minor in chambers, or at some  
32 other comfortable place other than the courtroom, on the record  
33 for a reasonable period of time with the support person, the  
34 prosecutor, and defense counsel present. The defendant or  
35 defendants shall not be present. The court shall conduct the  
36 questioning of the minor and shall not permit the prosecutor or  
37 defense counsel to examine the minor. The prosecutor and  
38 defense counsel shall be permitted to submit proposed questions  
39 to the court prior to the session in chambers. Defense counsel  
40 shall be afforded a reasonable opportunity to consult with the

1 defendant or defendants prior to the conclusion of the session in  
2 chambers.

3 (e) When the court orders the testimony of a minor to be taken  
4 in another place outside of the courtroom, the court shall do all of  
5 the following:

6 (1) Make a brief statement on the record, outside of the  
7 presence of the jury, of the reasons in support of its order. While  
8 the statement need not include traditional findings of fact, the  
9 reasons shall be set forth with sufficient specificity to permit  
10 meaningful review and to demonstrate that discretion was  
11 exercised in a careful, reasonable, and equitable manner.

12 (2) Instruct the members of the jury that they are to draw no  
13 inferences from the use of closed-circuit television as a means of  
14 facilitating the testimony of the minor.

15 (3) Instruct respective counsel, outside of the presence of the  
16 jury, that they are to make no comment during the course of the  
17 trial on the use of closed-circuit television procedures.

18 (4) Instruct the support witness, outside of the presence of the  
19 jury, that he or she is not to coach, cue, or in any way influence  
20 or attempt to influence the testimony of the minor.

21 (5) Order that a complete record of the examination of the  
22 minor, including the images and voices of all persons who in any  
23 way participate in the examination, be made and preserved on  
24 videotape in addition to being stenographically recorded. The  
25 videotape shall be transmitted to the clerk of the court in which  
26 the action is pending and shall be made available for viewing to  
27 the prosecuting attorney, the defendant or defendants, and his or  
28 her attorney during ordinary business hours. The videotape shall  
29 be destroyed after five years have elapsed from the date of entry  
30 of judgment. If an appeal is filed, the tape shall not be destroyed  
31 until a final judgment on appeal has been ordered. Any videotape  
32 that is taken pursuant to this section is subject to a protective  
33 order of the court for the purpose of protecting the privacy of the  
34 witness. This subdivision does not affect the provisions of  
35 subdivision (b) of Section 868.7.

36 (f) When the court orders the testimony of a minor to be taken  
37 in another place outside the courtroom, only the minor, a support  
38 person designated pursuant to Section 868.5, a nonuniformed  
39 bailiff, *the prosecuting attorney, the defense attorney, any*  
40 *technicians necessary to operate the closed-circuit equipment,*

1 and, after consultation with the prosecution and the defense, a  
2 representative appointed by the court, shall be physically present  
3 for the testimony. A videotape shall record the image of the  
4 minor and his or her testimony, and a separate videotape shall  
5 record the image of the support person.

6 (g) When the court orders the testimony of a minor to be taken  
7 in another place outside the courtroom, the minor shall be  
8 brought into the judge's chambers prior to the taking of his or her  
9 testimony to meet for a reasonable period of time with the judge,  
10 the prosecutor, and defense counsel. A support person for the  
11 minor shall also be present. This meeting shall be for the purpose  
12 of explaining the court process to the child and to allow the  
13 attorneys an opportunity to establish rapport with the child to  
14 facilitate later questioning by closed-circuit television. No  
15 participant shall discuss the defendant or defendants or any of the  
16 facts of the case with the minor during this meeting.

17 (h) When the court orders the testimony of a minor to be taken  
18 in another place outside the courtroom, nothing in this section  
19 prohibits the court from ordering the minor to be brought into the  
20 courtroom for a limited purpose, including the identification of  
21 the defendant or defendants as the court deems necessary.

22 (i) The examination shall be under oath, and the defendant or  
23 defendants shall be able to see and hear the minor witness and if  
24 two-way closed-circuit television is used, the defendant's image  
25 shall be transmitted live to the witness.

26 (j) Nothing in this section affects the disqualification of  
27 witnesses pursuant to Section 701 of the Evidence Code.

28 (k) The cost of examination by contemporaneous  
29 closed-circuit television ordered pursuant to this section shall be  
30 borne by the court out of its existing budget.